

185 FERC ¶ 61,186
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
Allison Clements, and Mark C. Christie.

Solar Energy Industries Association

Docket Nos. EL23-28-001

v.

Midcontinent Independent System Operator, Inc.

Midcontinent Independent System Operator, Inc.

ER23-1195-002

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued December 19, 2023)

1. This order addresses the rehearing requests filed in response to two related orders, issued on August 31, 2023, regarding the prohibition of Dispatchable Intermittent Resources (DIR)¹ from participating in MISO's ancillary services markets. Solar Energy Industries Association (SEIA) seeks rehearing of the Commission's order in Docket No. EL23-28-000, which denied SEIA's complaint (Complaint) alleging that the Tariff is unjust, unreasonable, and unduly discriminatory or preferential because it prohibits DIRs from providing the ancillary services that they are technically capable of providing.² Separately, SEIA, American Clean Power Association, Clean Grid Alliance, Natural Resources Defense Council, Fresh Energy, Union of Concerned Scientists, and Sierra Club (together, Clean Energy Coalition) seek rehearing of the Commission's order in Docket No. ER23-1195-001, which accepted MISO's proposed Tariff revisions to make DIRs ineligible to provide the Up Ramp Capability (Up Ramp) and Down Ramp Capability (Down Ramp) products (together, Ramp Capability Products).³

¹ Capitalized terms used but not otherwise defined in this order have the meanings ascribed to them in the Midcontinent Independent System Operator, Inc. (MISO) Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).

² *Solar Energy Industries Ass'n v. Midcontinent Indep. Sys. Operator, Inc.*, 184 FERC ¶ 61,137 (2023) (Complaint Order).

³ *Midcontinent Indep. Sys. Operator, Inc.*, 184 FERC ¶ 61,134 (2023) (Tariff Order).

2. Pursuant to *Allegheny Defense Project v. FERC*,⁴ the rehearing requests filed in these proceedings may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act (FPA),⁵ we are modifying the discussion in the Complaint Order and Tariff Order and continue to reach the same result in these proceedings, as discussed below.⁶

I. Background

A. MISO's Ancillary Services Markets and Historical DIR Participation Prohibition

3. MISO operates both a Day-Ahead Market and a Real-Time Market for ancillary services, which are simultaneously co-optimized with its Day-Ahead and Real-Time energy markets. MISO currently runs markets for several types of ancillary services that give MISO the ability and flexibility to resolve imbalances between supply and demand. These ancillary services include: (1) regulating reserves to follow moment-by-moment changes in demand and frequency; (2) spinning and supplemental contingency reserves requiring 10-minute deployment; (3) Up Ramp and Down Ramp capability products used to manage near-term load-generation variability related to forecast uncertainty; and (4) online and offline short-term reserves that provide 30-minute operational flexibility to meet reliability needs.⁷ MISO's operating reserves consist of Regulating Reserve, Contingency Reserve, Up Ramp Capability and Down Ramp Capability.⁸

⁴ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁵ 16 U.S.C. § 825l(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

⁶ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Complaint Order or the Tariff Order. See *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁷ MISO, Tariff, Module C (Energy and Operating Reserve Markets), § 39 (Day-Ahead Energy and Operating Reserve Market Processes and Settlements) (38.0.0); *id.*, § 40.2 (Real-Time Energy and Operating Reserve Market) (41.0.0).

⁸ MISO defines “Operating Reserve” as “[t]hat capability above firm system demand maintained to provide for Regulation, Load forecasting error, equipment forced and scheduled outages, and local area protection. It consists of Regulating Reserve,

4. In 2011, in Docket No. ER11-1991, the Commission accepted MISO's proposed revisions to the Tariff that created a new category of resources, DIRs (e.g., dispatchable wind and solar resources),⁹ and prohibited DIRs from providing operating reserves.¹⁰ However, the Commission also expressed concerns with MISO's prohibition of DIRs from providing operating reserves and required MISO to submit a compliance filing one year from the date of the DIR Order, addressing whether DIRs should be eligible to provide operating reserves and, if so, to submit appropriate Tariff revisions.¹¹ In February 2012, MISO submitted a compliance filing that included an analysis of DIR operations over the first six months of DIRs' market participation.¹² MISO concluded that, of all Real-Time dispatch intervals during the first six months of operations, DIRs were dispatched down (i.e., directed to reduce output) for non-congestion-related economic reasons approximately 0.2% of the time.¹³ MISO explained that it is only during these limited time periods that DIRs are more likely to be economic resources for purposes of providing operating reserves (i.e., clear the operating reserve market) and that there was little benefit in opening the operating reserve market to DIRs where the potential for DIRs to be considered economic to provide operating reserves is less than 0.5% of intervals. According to MISO, this limited benefit would come at the cost of decreasing the efficiency of reliable operations in over 99.5% of intervals by

Contingency Reserve, Up Ramp Capability and Down Ramp Capability.” *Id.*, Module A, § 1.O (Definitions – O) (56.0.0).

⁹ MISO defines a DIR as “[a] Generation Resource whose Economic Maximum Dispatch is dependent on forecast-driven fuel availability.” *Id.*, § 1.D (Definitions – D) (66.0.0).

¹⁰ *Midwest Indep. Transmission Sys. Operator, Inc.*, 134 FERC ¶ 61,141 (2011) (DIR Order).

¹¹ *Id.* P 107.

¹² MISO, Compliance Filing, Docket No. ER11-1991-000, at 4 (filed Feb. 28, 2012).

¹³ MISO explained that of the other times DIRs were dispatched downward, transmission congestion management was the cause of the downward dispatch and, during these intervals, clearing DIRs for ancillary services would have been contrary to efficient reliable operations because they were undeliverable due to transmission constraints. *Id.* at 3.

necessitating constant manual exclusions of DIRs whose potential clearing of operating reserves would exacerbate a binding transmission constraint.¹⁴

B. Complaint Order (Docket No. EL23-28)

5. On January 31, 2023, SEIA filed, pursuant to sections 206 and 306 of the FPA,¹⁵ a Complaint against MISO alleging that the Tariff is unjust, unreasonable, and unduly discriminatory and preferential because it prohibits DIRs from providing ancillary services in the wholesale market that they are technically capable of providing.¹⁶ MISO filed an answer and motion to dismiss on March 3, 2023 (March 3 Answer), as well as two subsequent answers on April 21, 2023 (April 21 Answer) and June 7, 2023.¹⁷ The Commission denied the Complaint, finding that SEIA had not satisfied its burden under section 206 of the FPA. Specifically, the Commission found that SEIA had not demonstrated that DIRs could reliably deliver the ancillary services they are cleared to provide to the MISO market in a manner comparable to non-DIRs at this time.¹⁸ The Commission accepted MISO's explanation that, due to software limitations and its zonal operating reserve market design, MISO would, in the vast majority of intervals, procure operating reserves from DIRs at times when they cannot deliver the product, which would, in turn, threaten reliability.¹⁹

6. On rehearing, SEIA alleges that the Commission erred by (1) relying on facts and arguments that were not contained in MISO's initial answer and, according to SEIA, were therefore waived; (2) relying on MISO's facts and evidence that were not supported by sworn testimony, affidavits, declarations, or modeling; and (3) relying on evidence inapplicable to hybrid resources in its decision to continue the prohibition on hybrid DIRs from providing ancillary services.

¹⁴ *Id.* at 4. The Commission took no further action on this compliance filing.

¹⁵ 16 U.S.C. §§ 824e, 825e.

¹⁶ Complaint at 1-2, 32, 46.

¹⁷ SEIA submitted responses to MISO's March 3 Answer and MISO's April 21 Answer.

¹⁸ Complaint Order, 184 FERC ¶ 61,137 at PP 47-46.

¹⁹ *Id.* P 48 (citing MISO April 21 Answer at 19).

C. Tariff Order (Docket No. ER23-1195)

7. On February 28, 2023, MISO filed, pursuant to section 205 of the FPA²⁰ and Part 35 of the Commission's regulations,²¹ Tariff revisions to make DIRs ineligible to provide Ramp Capability Products. In accepting the proposed revisions, the Commission agreed that MISO currently faces operational and price formation challenges associated with DIRs being unable to deliver Ramp Capability Products in the vast majority of intervals that DIRs are cleared to provide Ramp Capability Products.²² Based on this evidence, which included empirical facts, the Commission determined that MISO's proposed Tariff revisions are just and reasonable and not unduly discriminatory or preferential because they would allow MISO to procure Ramp Capability Products from only those resources that can reliably deliver them.²³

8. On rehearing, Clean Energy Coalition argues that the Commission erred by (1) failing to meaningfully respond to arguments that hybrid resources should be able to provide Up Ramp; and (2) relying on evidence inapplicable to hybrid resources in its decision to accept MISO's proposal to prohibit hybrids from providing Up Ramp.

II. Discussion

A. Procedural Matters

9. On October 17, 2023, MISO filed a motion for leave to answer and answer to SEIA's request for rehearing in Docket No. EL23-28-001, as well as a motion for leave to answer and answer to Clean Energy Coalition's request for rehearing in Docket No. ER23-1195-002. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure²⁴ prohibits an answer to a request for rehearing. Accordingly, we deny MISO's motions to answer and reject its answers in both dockets.

²⁰ 16 U.S.C. § 824d.

²¹ 18 C.F.R. pt. 35 (2022).

²² Tariff Order, 184 FERC ¶ 61,134 at P 64.

²³ *Id.* PP 9, 64-67.

²⁴ 18 C.F.R. § 385.713(d)(1) (2022).

B. Complaint Order**1. Consideration of Arguments in MISO's April 21 Answer****a. SEIA's Rehearing Request**

10. SEIA contends that the Commission erred in relying on defenses that were not included in MISO's initial answer to the Complaint and, according to SEIA, were therefore waived and should have been dismissed.²⁵ SEIA alleges that MISO unlawfully buttressed its initial March 3 Answer and offered new defenses that were not set forth in the initial answer.²⁶ SEIA asserts that it is impermissible for parties to conduct their arguments such that they are moving targets thereby frustrating administrative finality.²⁷

11. SEIA asserts that Rule 213(c)(2)(ii) of the Commission's Rules of Practice and Procedure requires that respondents to a complaint "set forth every defense relied on" and "[a]dmit or deny *specifically and in detail, each material allegation of the pleading answered.*"²⁸ According to SEIA, the Commission has taken the position that, under this rule, any reasonably available defenses that were not raised in an initial answer are waived.²⁹ SEIA also argues that MISO did not request waiver of Rule 213(c)(2)(ii), nor did it explain why the arguments and factual assertions presented in its April 21 Answer could not have been provided in its initial March 3 Answer.³⁰

²⁵ SEIA Rehearing Request at 4, 9-13. SEIA also asserts that the Commission failed to address SEIA's argument in response to MISO's April 21 Answer, which raised this same objection. *Id.* at 5-6.

²⁶ *Id.* at 10 (citing 18 C.F.R. § 385.213(c)(2)(ii)) (2022).

²⁷ *Id.* at 11 (citing *PPL Elec. Utils. Corp.*, 124 FERC ¶ 61,229, at P 7 (2008); *TransCanada Power Mktg. Ltd. v. ISO New England Inc.*, 123 FERC ¶ 61,149, at P 22 (2008) (*TransCanada*); *N.Y. Indep. Sys. Operator, Inc.*, 112 FERC ¶ 61,283, at P 35 n.20 (2005)).

²⁸ *Id.* at 10 (quoting 18 C.F.R. § 385.213(c)(2)(i)-(ii) (emphasis by SEIA)).

²⁹ *Id.* (citing *Vitol Inc. & Federico Corteggiano*, 169 FERC ¶ 61,070, at P 31 n.91 (2019) (*Vitol*); *FERC v. Silkman*, 177 F. Supp. 3d 683, 697 (D. Mass. 2016) (*Silkman*)).

³⁰ *Id.* at 12.

b. Commission Determination

12. We disagree that the Commission erred to the extent the Complaint Order relied on facts and arguments not contained in MISO's March 3 Answer. Rule 213(c)(2) provides that "the answerer must, to the extent practicable . . . set forth every defense relied upon,"³¹ and we continue to find that it is appropriate for the Commission to consider MISO's additional arguments and defenses raised in subsequent answers to the extent such consideration assists the Commission in its decision-making process.³² Furthermore, SEIA cites no precedent where the Commission, in a section 206 complaint proceeding, has invoked Rule 213(c)(2) to reject additional arguments made by respondents prior to the issuance of a Commission order. We encourage parties to all of our proceedings to raise their arguments as early in a given proceeding as possible.³³ Here, because MISO's April 21 Answer assisted the Commission in its decision-making process, we find it appropriate to exercise our broad discretion with respect to enforcement of our procedural rules.³⁴

13. The precedent cited by SEIA is not applicable here and does not compel the rejection of arguments raised in MISO's April 21 Answer. In *Silkman*, the court made no determination as to the permissibility of new arguments raised in subsequent answers before the issuance of a dispositive order in a Commission proceeding.³⁵ *Vitol* is

³¹ 18 C.F.R. § 385.213(c)(2).

³² See Complaint Order, 184 FERC ¶ 61,137 at P 42 (accepting MISO's April 21 Answer); see also *id.* PP 46-48 (citing MISO's April 21 Answer in addressing arguments raised in the Complaint).

³³ See *PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,265, at P 18 n.20 (2010) (emphasizing the importance of determining "at an early stage in the proceeding, who are the interested parties and what information and arguments they bring to bear"); *PPL Great Works, LLC & Penobscot River Restoration Trust*, 131 FERC ¶ 61,035, at P 10 (2010) (same).

³⁴ *City of Fremont v. FERC*, 336 F.3d 910, 917 (9th Cir. 2003) ("As a general principle, 'it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.'") (quoting *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970)).

³⁵ 177 F. Supp. 3d 683 at 695. The *Silkman* proceeding involved the assessment of civil penalties following an investigation from the Commission's Office of Enforcement and an order to show cause proceeding, to which respondents filed an answer. Upon the respondents' failure to pay the civil penalties, the Commission filed a petition in the United States District Court for the District of Massachusetts seeking affirmance of its

similarly unavailing. There, the Commission addressed the specificity with which a respondent must develop its arguments in defense, as the respondent had only perfunctorily asserted certain arguments without further developing them.³⁶ Like *Silkman*, *Vitol* does not address the timing of arguments raised before the Commission before a dispositive order.

14. Further, contrary to SEIA's assertion, the Commission's consideration of arguments raised in MISO's April 21 Answer in this case does not prejudice SEIA because SEIA had the opportunity, in its May 12 Answer, which was also accepted by the Commission, and now on rehearing, to respond to MISO's arguments.³⁷ Further, accepting MISO's April 21 Answer does not impermissibly create a "moving target" and "thereby frustrat[e] administrative finality."³⁸ The cases that SEIA cites for this proposition all involved rehearing requests or pleadings that were construed as such,³⁹ where Rule 713(d) expressly prohibits answers.⁴⁰ The interest of administrative finality

civil penalty order. The Commission argued, and the court agreed, that defenses not raised in the agency proceeding first before the Commission had been waived. *Id.* at 695-97.

³⁶ *Vitol*, 169 FERC ¶ 61,070 at PP 29-30. Similar to *Silkman*, at issue in this case was an order assessing civil penalties against respondents following an enforcement investigation and order to show cause. The Commission stated that additional defenses could not be "reserved" and were waived to the extent not raised in response to the order to show cause. *Id.* P 31 n.91.

³⁷ See *City of Fremont v. FERC*, 336 F.3d at 917-18 (relaxation of Commission procedural rules is appropriate where there is no prejudice to a party).

³⁸ SEIA Rehearing Request at 10-11 & n.48 (citing *PPL Elec. Utils. Corp.*, 124 FERC ¶ 61,229 at P 7; *TransCanada*, 123 FERC ¶ 61,149 at P 22; *N.Y. Indep. Sys. Operator, Inc.*, 112 FERC ¶ 61,283 at P 35 n.20).

³⁹ *TransCanada* was an initial order on a complaint that the Commission determined "amount[ed] to a rehearing of the rehearing" in another docket. 123 FERC ¶ 61,149 at P 21.

⁴⁰ 18 C.F.R. § 385.713(d). Because parties are precluded from filing answers to requests for rehearing, the Commission has long held that allowing parties to introduce arguments at the rehearing stage raises concerns of fairness and due process. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 172 FERC ¶ 61,056, at P 38 (2020); *Omaha Pub. Power Dist.*, 164 FERC ¶ 61,238, at P 11 (2018) (citing *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 16 (2016)). Those concerns are not present in the instant

is less compelling prior to the issuance of a dispositive order, and is outweighed here by the utility of MISO's subsequent answers for our decision-making process.⁴¹

15. In any event, we disagree that MISO's April 21 Answer relies on "entirely new defenses."⁴² Contrary to SEIA's rehearing argument,⁴³ section E of MISO's March 3 Answer, entitled "Allowing DIRs to Qualify to Provide Operating Reserves Will Have Detrimental Reliability and Operational Impacts Under MISO's Current Market Design," contains a discussion of the non-deliverability problem as it applies specifically to DIRs.⁴⁴ Regarding MISO's software limitations and transmission constraints, MISO's March 3 Answer also explains the deliverability problem at issue here in its description of how MISO's market clearing process for Operating Reserve Products procures these products on a market-wide or zonal basis that does not consider more granular locational constraints, which would generally result in MISO clearing DIRs for products they are not able to deliver to the market due to those locational constraints.⁴⁵

2. Absence of Sworn Testimony, Affidavits, Declaration or Modeling in MISO's Answers

a. SEIA's Rehearing Request

16. SEIA argues that the Commission erred by relying on facts and arguments offered by MISO relating to its market clearing software and manual screening capabilities that

proceeding, because answers may be permitted under Rule 213(a)(2) and the Commission has accepted SEIA's response to MISO's April 21 Answer.

⁴¹ See *Delmarva Power & Light Co.*, 145 FERC ¶ 61,055, at P 14 n.21 (2013) (accepting responsive filings and distinguishing "moving target" precedent as "deal[ing] with parties submitting new evidence on rehearing, not with parties filing responses to positions during the initial consideration of the filing").

⁴² SEIA Rehearing Request at 3, 9.

⁴³ SEIA alleges that MISO did not mention the terms "similarly situated" or "non-deliverability" in MISO's March 3 Answer, apart from "fleeting reference" to non-deliverability in relation to MISO's Ramp Capability Product. *Id.* at 9-10.

⁴⁴ MISO March 3 Answer at 16.

⁴⁵ *Id.* at 16-17; *contra* SEIA Rehearing Request at 10 (alleging that issues related to MISO's "software limitations" and "transmission constraints" were not identified or specifically discussed in MISO's March 3 Answer).

were not supported by sworn testimony, affidavits, declaration, or modeling.⁴⁶ SEIA argues that Rule 213(c)(4) of the Commission's Rules of Practice and Procedure requires that an answer to a complaint must include documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including, but not limited to, contracts and affidavits.⁴⁷ SEIA contends that the arguments contained in MISO's answers were unsupported by any record documents and that it was therefore impossible for SEIA or the Commission to verify or contest the accuracy of MISO's assertions or to understand the assumptions underlying MISO's claims.⁴⁸ SEIA argues that the Commission should therefore have discarded MISO's unsupported factual statements.⁴⁹

b. Commission Determination

17. We disagree with SEIA that the Commission erred in relying on facts and arguments included in MISO's answers without any accompanying sworn testimony, affidavits, declarations, or modeling. SEIA cites no cases in support of its claim that arguments submitted in an answer to a complaint must be accompanied by sworn testimony or other documents.⁵⁰ Rule 213(c)(4) of the Commission's Rules of Practice and Procedures provides that an answer must contain "to the extent practicable . . . documents that support the facts in the answer . . . including, but not limited to, contracts and affidavits."⁵¹ But, as noted above,⁵² the Commission has broad discretion with respect to application of its procedural rules, and we continue to find probative the arguments in MISO's answers despite being unaccompanied by exhibits or testimony.⁵³

⁴⁶ SEIA Rehearing Request at 4, 13. SEIA also asserts that the Commission failed to address SEIA's argument challenging the adequacy of MISO's answers. *Id.* at 7.

⁴⁷ *Id.* at 15 (citing 18 C.F.R. § 385.213(c)(4)).

⁴⁸ *Id.* at 13-14.

⁴⁹ *Id.* at 14.

⁵⁰ On rehearing, SEIA also argues that the Commission failed to meaningfully address its procedural arguments with respect to this rule. *Id.* at 5-7. We respond by addressing these arguments herein.

⁵¹ 18 C.F.R. § 385.213(c)(4).

⁵² *See supra* P 12.

⁵³ Substantial evidence need not necessarily include sworn testimony or affidavits. *See Richardson v. Perales*, 402 U.S. 389, 402 (1971) (finding that unsworn reports constituted substantial evidence upon which an agency could rely); *Echostar Commc'ns Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002) (uncorroborated and untested

As to concerns regarding the veracity of MISO's explanation as to its own capabilities and software, we note that MISO's senior corporate counsel signed each of MISO's answers. Under Rule 2005(a) of the Commission's Rules of Practice and Procedure, this constitutes a certificate that "the signer has read the filing signed and knows its contents" and that "the contents are true as stated, to the best knowledge and belief of the signer."⁵⁴

18. More generally, as the complainant in this section 206 proceeding, it is SEIA's burden to establish that the Tariff is unjust, unreasonable, unduly discriminatory or preferential. To prevail on an undue discrimination claim, SEIA must make a *prima facie* case that DIRs and non-DIRs (1) are similarly situated and (2) that any differential treatment between the two types of resources is not justified by some legitimate factor.⁵⁵ Only after SEIA has established the *prima facie* case would any burden shift to MISO to raise an affirmative defense. Despite reciting this standard in its Complaint,⁵⁶ SEIA's arguments are not tailored to these elements and, significantly, SEIA does not provide evidence⁵⁷ to contravene MISO's earlier assessment in Docket No. ER11-1991-000 that,

testimony can constitute substantial evidence, supporting an administrative decision, as can hearsay if it is reliable and trustworthy).

⁵⁴ 18 C.F.R. § 385.2005(a) (2022).

⁵⁵ See *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010) ("The court will not find a Commission determination to be unduly discriminatory if the entity claiming discrimination is not similarly situated to others."); *City of Newark v. FERC*, 763 F.2d 533, 546 (3d Cir. 1985) ("[D]ifferences in rates are justified where they are predicated upon factual differences between customers"); *Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2002) ("A rate is not unduly preferential or unreasonably discriminatory if the utility can justify the disparate effect."); *Town of Norwood v. FERC*, 202 F.3d 392, 402 (1st Cir. 2000) ("[D]ifferential treatment does not necessarily amount to undue preference where the difference in treatment can be explained by some factor deemed acceptable by the regulators (and the courts).").

⁵⁶ Complaint at 32-33, 36-37.

⁵⁷ We note that SEIA, the entity with the burden under section 206, also did not provide sworn testimony, affidavits, or declarations in this proceeding. *Contra* 18 C.F.R. § 385.206(b)(8) (2022) (requiring complainant to "[i]nclude all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits"). SEIA characterizes the report submitted by Dr. Michael Milligan as a "declaration" that includes "expert testimony," but we note that the report submitted by Dr. Milligan is unsworn and unverified. Complaint at 2, 49 (referring to the report as a "declaration"); SEIA May 12 Answer at 17 (stating that Dr. Milligan "provides several pages of expert testimony").

unlike non-DIRs, there are only limited time periods that DIRs are likely to be economic resources for providing operating reserves at times when they are also deliverable to the market, and that such low level of availability does not justify participation in the operating reserves market.⁵⁸ Having failed to demonstrate that DIRs and non-DIRs are similarly situated, SEIA has not established a *prima facie* case of undue discrimination and, thus, there is no shift in burden requiring MISO to come forward with an affirmative defense.⁵⁹ Nonetheless, MISO did, in fact, counter SEIA's undue discrimination claims by putting forth credible arguments to show that DIRs and non-DIRs are not currently similarly situated in MISO.

3. Hybrid Resources

a. SEIA's Rehearing Request

19. SEIA also alleges that the Commission erred by relying on evidence inapplicable to hybrid resources in its decision to continue the prohibition on hybrid DIRs from providing ancillary services.⁶⁰ According to SEIA, hybrid resources have unique characteristics, which should be considered in determining eligibility to participate in MISO's ancillary service markets. SEIA also argues that hybrid resources will hold growing importance for MISO because they comprise a substantial part of MISO's generator interconnection queue.⁶¹

20. SEIA argues that the Commission failed to address the differences between hybrid resources and stand-alone wind or solar resources and instead relied exclusively on data that either pre-dates hybrid resources or is from the 2022 Real-Time Market—a period

⁵⁸ See *supra* P 4.

⁵⁹ See *Alterna Springerville LLC v. Tucson Elec. Power Co.*, 153 FERC ¶ 61,125, at P 16 (2015) (citing *Nantahala Power & Light Co.*, Opinion No. 139, 19 FERC ¶ 61,152, at 61,276 (1982) (“As the judge properly points out, the burden of proof in a [section] 206 complaint proceeding is on the complainant. The burden consists of coming forward with a *prima facie* case and once this initial burden is met, the burden shifts to the respondent to make an affirmative defense. The judge does not distinguish the test for ultimate burden of proof from that of establishing a *prima facie* case. The test for *prima facie* evidence is whether there are facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain.”)).

⁶⁰ SEIA Rehearing Request at 5, 16.

⁶¹ *Id.* at 8.

during which MISO had only a single hybrid resource.⁶² SEIA argues that this does not reflect upcoming changes to the resource mix based on the 80 hybrid resources that are pending in MISO's interconnection queue.⁶³

21. Citing the declaration of Dr. Milligan and a report from Lawrence Berkeley National Laboratory, SEIA argues that ancillary services revenues could form a significant part of hybrid resource business models.⁶⁴ According to SEIA, hybrid resource participation presents different dynamics due to the interaction between the generation and storage components. SEIA adds that modeling reveals that hybrid resources can receive "significantly higher" value from participating in ancillary services markets compared to stand-alone wind or solar resources.⁶⁵

22. SEIA argues that, in denying the Complaint, the Commission based its determination on the premise that DIRs are not similarly situated to non-DIRs because DIRs' economic incentives would "nearly always" result in providing energy rather than ancillary services and because DIRs almost exclusively clear for ancillary services when located behind a binding transmission constraint.⁶⁶ SEIA argues that the Commission's conclusions on this point did not wrestle with the more complex economic choices faced by a hybrid resource, including the choice among charging paired storage, providing energy or providing ancillary services.⁶⁷

23. SEIA states that a hybrid resource's battery will tend to maintain a state of charge that allows it to provide maximum amounts of upward and downward reserves. While recognizing that the battery component of hybrids may participate in an ancillary services market when modeled and offered as a co-located resource, SEIA maintains that co-

⁶² *Id.* at 16.

⁶³ *Id.* at 16, 18.

⁶⁴ *Id.* at 17 (citing Frederick Kahrl et al., *Variable Renewable Energy Participation in U.S. Ancillary Services Markets*, Lawrence Berkeley National Laboratory (Oct. 2021), https://etapublications.lbl.gov/sites/default/files/vre_as_full_report_release.pdf (LBNL Report, attached as Exhibit B to SEIA's Complaint)).

⁶⁵ *Id.*

⁶⁶ *Id.* at 18 (citing Complaint Order, 184 FERC ¶ 61,137 at P 50).

⁶⁷ *Id.*

location and separate registration may not be feasible for tightly coupled hybrids where shared cost in design does not allow for separate market participation.⁶⁸

b. Commission Determination

24. We continue to find that SEIA has not satisfied its burden under section 206 to demonstrate that the Tariff, by excluding DIRs from providing ancillary services, is unjust, unreasonable, unduly discriminatory or preferential.⁶⁹ Further, we disagree that the Commission's denial of the Complaint was in error to the extent it "relied on evidence inapplicable to hybrid resources."⁷⁰ In particular, SEIA has not demonstrated that DIRs, which can include solar, wind, and hybrid resources, could reliably deliver any ancillary services they would be cleared to provide under MISO's current ancillary service clearing process and market conditions.⁷¹ In that respect, we continue to find that DIRs are not currently similarly situated to non-DIRs.⁷² Despite providing the general assertion that "the dynamics regarding hybrid participation are fundamentally different and more complex than for standalone wind and solar resources,"⁷³ SEIA has not provided any evidence that, unlike solar and wind DIRs, hybrid resources that are registered as DIRs in MISO can reliably deliver ancillary services they would be cleared to provide. Moreover, while SEIA contends that the Commission's reasoning in the Complaint Order fails to consider the "significant differences between hybrid resources and stand-alone wind or solar resources,"⁷⁴ SEIA fails to describe those "significant differences" in the context of the DIR deliverability issue identified by MISO.

25. To the extent that SEIA argues that hybrid resources are not similarly situated to standalone wind and solar DIRs and are instead more similarly situated to non-DIRs, SEIA's distinctions lack specificity and are not sufficient to support an undue discrimination claim under section 206 of the FPA. The primary distinction identified in

⁶⁸ *Id.* at 19.

⁶⁹ Complaint Order, 184 FERC ¶ 61,137 at P 43.

⁷⁰ SEIA Rehearing Request at 5. SEIA also argues that the Commission did not meaningfully address its arguments as they applied specifically to hybrid resources. *Id.* at 7. We address those arguments herein.

⁷¹ Complaint Order, 184 FERC ¶ 61,137 at P 46.

⁷² *Id.* PP 46, 50.

⁷³ SEIA Rehearing Request at 17.

⁷⁴ *Id.* at 16.

SEIA's Complaint between hybrid and stand-alone DIRs is based on a report attached to the Complaint from Dr. Milligan speculating that "ancillary service 'revenues could be a significant part of the hybrid . . . business models.'" ⁷⁵ Neither Dr. Milligan nor SEIA provides specific evidence that hybrid resources registered as DIRs are currently situated any differently than wind and solar DIRs with regard to the deliverability issues MISO raised. SEIA's discussion of hybrid resources in its May 12 Answer ⁷⁶ also does not address this point but instead simply notes that the first hybrid resource did not begin participating in MISO's market until January 2022 and that, as of September 2022, there were approximately 80 hybrid resources pending in the interconnection queue. ⁷⁷ The potential increase in the prevalence of hybrid resources in MISO does not, on its own, demonstrate undue discrimination. ⁷⁸ Furthermore, we note that hybrid resources are not categorically excluded from participating in MISO's ancillary services market because, as SEIA acknowledges on rehearing, the battery component of a hybrid resource may participate in the ancillary services market when it is modeled and offered as a separate resource co-located with a wind or solar DIR. ⁷⁹ To prevail under section 206, SEIA was required to demonstrate why it is unjust, unreasonable, unduly discriminatory or preferential for MISO to exclude hybrid resources registered as DIRs from participation in MISO's ancillary services market. SEIA has made no such demonstration.

26. On rehearing, SEIA attempts for the first time to expand on Dr. Milligan's limited conclusions as to the economics of hybrid resources by citing the following proposition from an LBNL publication discussed in Dr. Milligan's report: "Modeling reveals that hybrid resources can receive 'significantly higher' value from participating in ancillary

⁷⁵ Complaint, Ex. A at 12.

⁷⁶ SEIA May 12 Answer at 18-19.

⁷⁷ *Id.*

⁷⁸ SEIA contends that the emergence of hybrid resources is significant because it casts doubt on MISO's data, which either pre-dates hybrid resources or is from the 2022 Real-Time Market, when MISO had only a single hybrid resource. SEIA Rehearing Request at 16. This argument is unpersuasive because it is SEIA, not MISO, that bears the burden of proof in this section 206 proceeding. 16 U.S.C. § 824e(a) ("[T]he burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon . . . the complainant.").

⁷⁹ SEIA Rehearing Request at 19. SEIA does not define the term "hybrid resource" in its pleadings but appears to take the view that hybrid resources can include both an integrated hybrid resource registered as DIR and a co-located resource in which only the wind or solar component is registered as a DIR. *See id.*

services markets, compared to stand-alone wind or solar resources.”⁸⁰ Even if we were to consider these new arguments,⁸¹ we would continue to find this evidence inadequate to demonstrate MISO’s tariff to be unjust, unreasonable, unduly discriminatory or preferential. SEIA’s new references to the LBNL Report do not demonstrate that hybrid resources registered as DIRs are currently similarly situated to non-DIRs such that they should be permitted to participate in MISO’s ancillary services market. While SEIA argues generally that the economics for hybrid resources are more complex than for standalone wind and solar resources due to the interaction between generation and storage components,⁸² SEIA does not provide evidence to show that hybrid resources registered as DIRs can deliver the ancillary services they would be cleared to provide to the market in a manner comparable to non-DIRs. That is, SEIA has not demonstrated that hybrid resources registered as DIRs will not be subject to the same deliverability issues MISO has identified for stand-alone wind and solar DIRs. Accordingly, we continue to find that SEIA has not demonstrated that prohibiting hybrid DIR resources from participating in MISO’s ancillary services markets is unduly discriminatory or preferential.

C. Tariff Order

1. Clean Energy Coalition’s Rehearing Request

27. Clean Energy Coalition seeks rehearing of the Tariff Order with respect to the inclusion of DIRs in MISO’s prohibition on providing Up Ramp.⁸³

28. Specifically, Clean Energy Coalition alleges that the Commission improperly ignored Clean Energy Coalition’s argument that MISO’s filing relied on a simplified

⁸⁰ *Id.* at 17-19 (quoting LBNL Report at 10).

⁸¹ “The Commission has repeatedly looked with disfavor on parties raising new issues and arguments for the first time on rehearing.” *Ne. Utils. Serv. Co. & Select Energy, Inc.*, 109 FERC ¶ 61,204, at P 16 (2004). We typically reject such new arguments raised on rehearing, unless we find that the argument could not have been previously presented, e.g., claims based on information that only recently became available or concerns prompted by a change in material circumstances. *Ala. Power Co.*, 179 FERC ¶ 61,128, at P 15 (2022); *KEI (Me.) Power Mgmt. (III) LLC*, 173 FERC ¶ 61,069, at P 38 n.77 (2020). Here, the LBNL Report was attached as an exhibit to SEIA’s Complaint such that SEIA could have invoked the relevant section of the report in its argument but did not.

⁸² SEIA Rehearing Request at 17.

⁸³ Clean Energy Coalition Rehearing Request at 2.

view of DIR economics that did not account for hybrid DIRs.⁸⁴ According to Clean Energy Coalition, hybrid DIRs can inject power onto the grid at less than their full capability not due to transmission constraints, but rather because they are charging paired storage.⁸⁵ Clean Energy Coalition states that the decision of a hybrid DIR to either charge the battery or to provide ramp service depends on different economics than the choices faced by stand-alone wind or solar.⁸⁶ Clean Energy Coalition alleges that MISO's June 5, 2023 deficiency response demonstrated that planned hybrid resources will not necessarily be subject to the same transmission constraints as existing wind and solar resources.⁸⁷ Clean Energy Coalition alleges that the Commission did not provide any substantive reasoning regarding hybrids, and instead relied on MISO's theories and data regarding DIRs as a whole.⁸⁸

29. Clean Energy Coalition further alleges that the Commission's determination in the Tariff Order is not supported by substantial evidence with respect to its application to hybrid resources.⁸⁹ According to Clean Energy Coalition, the Commission did not have any basis for holding that MISO carried its burden to show that prohibiting hybrid resources from providing Up Ramp was just, reasonable, and not unduly discriminatory.⁹⁰ Specifically, Clean Energy Coalition states that the Commission failed to explain how the data it relied upon was representative of hybrid performance.⁹¹ Clean Energy Coalition further argues that the Commission did not address the feasibility of MISO's operators manual screening for hybrid resources that are not able to deliver Up Ramp.⁹²

⁸⁴ *Id.* at 3.

⁸⁵ *Id.* at 3-4.

⁸⁶ *Id.* at 4.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 5.

⁹¹ *Id.*

⁹² *Id.* at 5-6.

2. Commission Determination

30. We sustain the Commission's finding that MISO has met its burden under section 205 of the FPA to demonstrate that its proposed Tariff revisions are just and reasonable and not unduly discriminatory or preferential, including insofar as the Tariff revisions apply to hybrid resources registered as DIRs.

31. We find that the Commission's determination in the Tariff Order is supported by the substantial evidence presented by MISO, including the Affidavit of Dr. David Patton, the President of MISO's Independent Market Monitor (Potomac Economics), regarding the deliverability of DIRs cleared to provide Up Ramp in MISO's energy and ancillary services market. Specifically, MISO provided evidence that, in the 2022 MISO Real-Time Market, 99.7% of the Up Ramp MWs cleared from DIRs were "economically undeliverable," with an average Marginal Congestion Cost (MCC) of $-\$73.33/\text{MWh}$.⁹³ In comparison, MISO stated that 31.0% of the Up Ramp MWs cleared from non-DIRs were "economically undeliverable," with an average MCC of $-\$5.83/\text{MWh}$.⁹⁴ Potomac Economics explained that "in reality, a slightly negative MCC is very different than a deeply negative MCC" and that "a slightly negative MCC does *not* indicate that a resource is undeliverable," as the Real-Time Market can manage the congestion with little cost by redispatching other resources to access the resource behind the transmission constraint.⁹⁵ In contrast, Potomac Economics explained that the MCC of $-\$73.33/\text{MWh}$ for DIRs indicates that: (1) the Real-Time dispatch does not have access to redispatch capability that would allow the Up Ramp from the DIRs to be delivered, and (2) DIRs are only cleared to provide Up Ramp when that Up Ramp capability is undeliverable.⁹⁶ Accordingly, Potomac Economics concluded that the average MCC for cleared Up Ramp indicates "that the DIRs are almost never deliverable when scheduled to provide Up Ramp while non-DIRs are almost always deliverable."⁹⁷

32. The Commission's finding that the Tariff revisions are not unduly discriminatory as to hybrid resources is further supported by MISO's provision of an alternative participation option for solar and wind resources co-located with storage. A resource that meets the definition of Hybrid Resource under the MISO Tariff is not limited to

⁹³ MISO Deficiency Response, Docket No. ER23-1195-001, at 2.

⁹⁴ *Id.*

⁹⁵ Potomac Economics Comments, Docket No. ER23-1195-001, at 4.

⁹⁶ *Id.* at 4-5.

⁹⁷ *Id.* at 5.

registering as a single generator or DIR.⁹⁸ As noted above, the Tariff provides two market participation options for an owner of a resource that combines a wind/solar resource and on-site storage. First, the wind/solar resource and on-site storage can collectively register as a single DIR.⁹⁹ Alternatively, the wind/solar and storage resources can separately register as a DIR (for the wind/solar resource) and a co-located Electric Storage Resource (ESR) (for the on-site storage).¹⁰⁰ We agree with MISO that, in the co-located case, the Tariff revisions exclude only the DIR component from providing Ramp Capability Products.¹⁰¹ The ESR component of such a site containing two co-located resources remains eligible to provide Ramp Capability Products.¹⁰² Clean Energy Coalition offered no response to this co-located resource option, despite having filed a reply to the MISO filing in which it was first raised.¹⁰³

33. Clean Energy Coalition does not argue on rehearing that non-hybrid DIRs are inappropriately prohibited from providing Ramp Capability Products. To the extent that Clean Energy Coalition now seeks new market participation rules for “integrated hybrid

⁹⁸ See MISO, Tariff, Module A, § 1.H (Definitions – H) (58.0.0) (Hybrid Resource is defined as “[a] Generator that combines more than one type of Electric Facility for the production and/or storage for later injection of electricity.”).

⁹⁹ As noted above, a DIR is defined as “[a] Generation Resource whose Economic Maximum Dispatch is dependent on forecast-driven fuel availability.” *Id.*, § 1.D (Definitions – D) (66.0.0). The Tariff allows hybrid resources meeting this definition to participate as DIRs. See, e.g., *id.*, Module C, § 40.2.5 (Generation Offer and DRR-II Offer Rules in the Real-Time Energy and Operating Reserve Market) (66.0.0) (requiring that “a Market Participant shall submit a Forecast Maximum Limit for each Hybrid Resource registered as a Dispatchable Intermittent Resource.”).

¹⁰⁰ MISO Answer, Docket No. ER23-1195-000, at 20.

¹⁰¹ *Id.* at 21.

¹⁰² MISO, Tariff, Module C, § 40.2.4 (Resource Requirements for Operating Reserve) (47.0.0) (“Up Ramp Capability and Down Ramp Capability eligibility in the Real-Time Energy and Operating Reserve Market will be limited to . . . (iv) Electric Storage Resources with Commitment Status of Charge, Discharge or Continuous.”).

¹⁰³ We therefore do not consider Clean Energy Coalition’s new speculation that co-location “may not be feasible” in some circumstances. Clean Energy Coalition Rehearing Request at 6 n.19; see *Ala. Power Co.*, 179 FERC ¶ 61,128 at P 15; *KEI (Me.) Power Mgmt. (III) LLC*, 173 FERC ¶ 61,069 at P 38 n.77.

resources,”¹⁰⁴ such a challenge is outside of the scope of this section 205 proceeding.¹⁰⁵ As this is a rate filing under section 205, “the Commission undertakes an essentially passive and reactive role and restricts itself to evaluating the confined proposal.”¹⁰⁶ MISO’s Tariff revisions in this proceeding are specific to its Ramp Capability Products.¹⁰⁷ MISO’s targeted revisions ensure that DIRs are no longer qualified to provide the Ramp Capability Products, and, in the interest of non-discrimination, that non-DIRs may no longer earn revenues for Down Ramp.¹⁰⁸

The Commission orders:

(A) In response to SEIA’s request for rehearing, the Complaint Order is hereby modified and the result sustained, as discussed in the body of this order.

¹⁰⁴ Clean Energy Coalition indicates that hybrids with batteries may prefer participation as an integrated resource because co-location and separate registration may not be feasible for tightly coupled hybrids where shared cost in design does not allow for separate market participation. Clean Energy Coalition Rehearing Request at n.19.

¹⁰⁵ See *Sw. Power Pool, Inc.*, 150 FERC ¶ 61,110, at 61,820 (2015) (rejecting protest as beyond the scope of FPA section 205 proceeding); *Pac. Gas & Elec. Co.*, 179 FERC ¶ 61,199 (2022) (“[T]he Commission lacks authority in a section 205 proceeding to revise the existing rates, terms, and conditions of the [tariff].”).

¹⁰⁶ *Adv. Energy Mgmt. Alliance v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (internal quotation omitted).

¹⁰⁷ Transmittal, Docket No. ER23-1195-000, at 12; see also MISO, Tariff, Module A, § 1.U (Definitions – U) (40.0.0); *id.*, Module C, § 39.2.1B (Resource Requirements for Operating Reserve) (48.0.0); *id.*, § 40.2.4 (Resource Requirements for Operating Reserve) (47.0.0); *id.*, Schedule 28 (Demand Curves for Operating Reserve, Regulating and Spinning) (44.0.0).

¹⁰⁸ Transmittal, Docket No. ER23-1195-000, at 10.

(B) In response to Clean Energy Coalition's request for rehearing, the Tariff Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission. Commissioner Danly is not participating.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.